



1 (APPEARANCES CONTINUED)

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3 HUWAIDA ARRAH,  
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7 And

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12 FOR DEFENDANTS

13 HILLSDALE COUNTY, WAHTOLA,  
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19 FOR THE DEFENDANTS

20 CITY OF HILLSDALE,  
21 RATHBUN, HOLTZ: ROGER A. SMITH  
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1 (APPEARANCES CONTINUED)  
2 FOR THE DEFENDANT  
3 WATCH SYSTEMS, L.L.C.: DALE A. ROBINSON,  
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1 Wednesday, August 2, 2017

2 Detroit, Michigan

3 At approximately 3:15 p.m.

9 Who's here for the Plaintiff?

10 MS. HURWITZ: Julie Hurwitz for the  
11 Plaintiff. Huwaida Arrah and Steven Budaj also  
12 appearing on behalf of the Plaintiff.

13 THE COURT: How do you spell your last name?

14 MR. ARRAH: It's A R R A H.

15 THE COURT: And for the Defense.

16 MR. BREGE: Andrew Brege for the County  
17 Defendants, Parker, Wahtola and Leva.

18 MR. SMITH: Roger Smith, Your Honor, for the  
19 Defendants Rathbun, Holtz and the City of Hillsdale.

20 MR. ROBINSON: Dale Robinson on behalf of  
21 Watch Systems

22 THE COURT: This is the Motions to Dismiss,  
23 as I said docket numbers 70 and 83.

24 Who is going to go first?

25 MR. BREGE: Your Honor, Andrew Brege on

1 behalf of the County Defendants. I will go first.

2 I don't want to reiterate everything in the  
3 brief, but at the beginning I would like to address a, I  
4 suppose, housekeeping matter.

5 Our motion was filed as a 12(b)(6) motion  
6 in response to Plaintiff's Second Amended Complaint,  
7 which was attached to their motion requesting they file  
8 a Second Amended Complaint and this Court granted that  
9 motion at least with respect to the remaining  
10 Defendants.

11 That Second Amended Complaint hasn't, I  
12 suppose, been technically filed yet, so I would request  
13 that to the extent this Court considers our motion as  
14 one for 12(c) against the First Amended Complaint, there  
15 are no substantive differences at least on the facts  
16 between the First Amended Complaint and the Second  
17 Amended Complaint. The only differences are Plaintiff's  
18 conclusive allegations that Defendants acted  
19 deliberately or inaccurately.

20 The facts haven't changed one bit. The four  
21 Counts haven't changed one bit.

22 So whether this Court considers it a 12  
23 (b)(6) motion against the Second Amended Complaint or a  
24 12(c) motion against the First Amended Complaint, the  
25 arguments are the same.

1                   We've also raised it as a Rule 56 motion  
2 because we did attach additional material, but in  
3 Plaintiff's response, they conceded the materials we  
4 rely on were public records and weren't essential to  
5 their claim, so it could be considered a (b) (6) motion.

6                   So with that, I want to focus on the issue  
7 of qualified immunity because that's if Count 1 and  
8 Count 2 can't proceed against the individuals, Count 3  
9 and Count 4 aren't going to go forward.

10                  The Supreme Court has recently stated in  
11 White versus Pauley {ph} when it cautions lower courts  
12 against defining clearly established rights too broadly  
13 and said, quote, in the last five years, this Court has  
14 issued a number of opinions reversing federal courts in  
15 qualified immunity cases. The Court has found this  
16 necessary both because qualified immunity is important  
17 to society as a whole and because as immunity from suit  
18 qualified immunity is effectively lost if the cases are  
19 erroneously permitted to go to trial.

20                  Today it is again necessary to reiterate the  
21 long-standing principle that clearly standing law should  
22 not be defined at a high level of generality.

23                  As this Court explained decades ago, the  
24 clearly established law must be analyzed against the  
25 facts of the case; otherwise, plaintiffs would be able

1 to converse the rule of qualified immunity. The U.S.  
2 cite is not out for that case but I believe it is 137  
3 S.Ct 538 issued earlier in 2017.

4 I raise that because once qualified immunity  
5 is raised, it is Plaintiff's burden then to show that  
6 qualified immunity should not be applied by pointing to  
7 these particularized cases. Some things that are or  
8 similar circumstances that have happened to put a  
9 reasonable officer on notice that what they were doing  
10 was clearly established. Plaintiff has not done that in  
11 this case.

12 In this case, what Plaintiff has to do in  
13 order to establish that Lt. Parker did not have probable  
14 cause when he arrested Plaintiff in 2013, to overcome  
15 qualified immunity, Plaintiff must establish that Lt.  
16 Parker stated a deliberate falsehood or showed reckless  
17 disregard for the truth and that the alleged falsehood  
18 or omitted information was material for a finding of  
19 probable cause.

20 If you look at the facts as pled and based  
21 on the records attached to our motion, what Lt. Parker  
22 had was Plaintiff's sex offender registry information  
23 which stated he was convicted as an adult which clearly  
24 stated he still was under an obligation to register.

25 We know that Plaintiff did in fact register

1 but he registered an incorrect address. So we know all  
2 of that.

3 That sex offender registry, as this Court is  
4 well aware from the motions filed and the previous  
5 hearings we have had is maintained by the state of  
6 Michigan. The statutory scheme sets forth that it is  
7 maintained by the state of Michigan.

8 So Lt. Parker has that information when he  
9 arrests Plaintiff.

10 Plaintiff, it is admitted, had an incorrect  
11 address and all of that information was then transferred  
12 over to the prosecutor.

13 Exhibit 1 to our motion is Lt. Parker's  
14 report, and in his report, the last thing he says before  
15 his supplement on the first full page of the narrative  
16 of his report is a warrant request was sent to the  
17 prosecutor's office along with a copy of this report  
18 along with his CCH and SOR documents.

19 So Plaintiff's theory is that Lt. Parker  
20 should have known that Plaintiff didn't have to register  
21 because of information that was contained in his  
22 criminal history, his CCH and on the SOR documents.

23 The problem is is that information was never  
24 omitted from the prosecutor, it was provided to the  
25 prosecutor. The prosecutor still, with all that same

1 information that Lt. Parker had, still issued the  
2 warrant, still prosecuted Plaintiff and Plaintiff still  
3 pled to that.

4 So there is nothing that Lt. Parker withheld  
5 information or falsified information to Plaintiff's file  
6 where the SOR documentation indicates that Plaintiff has  
7 to register.

8 So when Lt. Parker says that he relied on  
9 the SOR information, he is not saying anything false, he  
10 is reporting what that record says. It is a legal  
11 conclusion whether Plaintiff was actually in violation  
12 of the law.

13 It is not up to Lt. Parker to make that  
14 conclusion, it is up to the prosecutor and the judge who  
15 ultimately dealt with that case. But Lt. Parker didn't  
16 withhold that information.

17 The prosecutor then issued the warrant and  
18 Plaintiff eventually pled to that charge.

19 Then if we look at the four arrests where  
20 Plaintiff is again alleging it is Lt. Parker who is  
21 feeding this false information.

22 What makes the four arrests and claim even  
23 more troubling is that by that point, Plaintiff has  
24 already been prosecuted and had pled and which the Court  
25 had entered the judgment.

1                   Plaintiff was sentenced to probation and had  
2 the fines and costs that were applied.

3                   So now there is a court order from a judge  
4 that says Plaintiff has an obligation to register under  
5 the SORA.

6                   He violated that. I don't know how it could  
7 possibly be argued that Lt. Parker knows that the judge  
8 was wrong, that the prosecutor was wrong, that Plaintiff  
9 himself was wrong and plaintiff's attorney were all  
10 wrong.

11                  So with all of that, I don't believe that  
12 there is any valid basis to deny qualified immunity to  
13 all of the Defendants in this case on the theory that  
14 the information they provided the prosecutor was false.  
15 None of the information that they provided was  
16 inaccurate.

17                  The only thing that was inaccurate was  
18 whether or not the actual SOR was accurate, but  
19 Plaintiff can't and hasn't cited any case that indicates  
20 that a police officer is not entitled to rely on a state  
21 sex offender registry that is maintained by the state  
22 and where there is nothing that indicates that they  
23 shouldn't be allowed to rely on their fellow officers  
24 and a certified state document.

25                  And if you look at Exhibit, I believe it is

1      Exhibit J of our co-defendant's brief, they actually  
2      have a couple of Plaintiff's SOR documentation attached  
3      to the brief. It is identified as a certified public  
4      record that identifies and that lists Plaintiff as an  
5      adult offender with the requirement to register.

6                   So it is Exhibit G to the co-defendant's  
7      brief document number 83-8.

8                   So taking all of that information together,  
9      I don't believe there is any reasonable basis to deny  
10     qualified immunity to the individuals.

11                  The Supreme Court in *Heien versus North*  
12     *Carolina*, says, quote:

13                  "To be reasonable is not to be perfect, and  
14                  so the Fourth Amendment allows for some  
15                  mistakes on the part of government  
16                  officials, giving them 'fair leeway for  
17                  enforcing the law in the community's  
18                  protection'."

19                  That is 135 S.Ct. 530 at 536.

20                  Here, Lt. Parker, if he has, it was a  
21                  mistake of relying on all of the information that he  
22                  had, which included Plaintiff's own objections of  
23                  registering when he apparently did not have a legal  
24                  obligation to continue to register.

25                  So unless the Court has any specific

1 questions for me, I rely on everything that has been  
2 presented in the court papers and incorporate by  
3 reference anything else that is set forth.

4 THE COURT: Okay. Thank you.

5 Do you wish to respond?

6 MR. SMITH: Again, Your Honor, Roger Smith  
7 on behalf of the City Defendants.

8 I'm certainly not going to belabor the  
9 issues any further. I adopt Counsel's recitation of the  
10 facts.

11 I also would indicate and remind the Court  
12 that when it dealt with the dismissed Defendants  
13 Marinoff and Kelly on behalf of the Michigan State  
14 Police, this Court already ruled in that context that  
15 regardless of whether we're dealing with the  
16 then-existing allegations in the First Amended Complaint  
17 or the proffered Second Amended Complaint, that neither  
18 of them contained anything other than conclusions or  
19 allegations insufficient to overcome an individual's  
20 entitlement to qualified immunity. And it would be  
21 futile to consider the allegations in the Second Amended  
22 Complaint as proper because they didn't add any factual  
23 support for the allegations.

24 So that is the same situation we find  
25 ourselves in here today regardless of whether we're

1 dealing with the First Amended Complaint or the  
2 seemingly authorized Second Amended Complaint but not  
3 yet filed.

4 I would also point out to the Court that my  
5 clients, officers Rathbun and Holtz, are even further  
6 removed from the meat of this case because not only  
7 would we rely on all the documentation that Lt. Parker  
8 has but we also rely upon his information as conveyed to  
9 us that there was probable cause to support the arrest  
10 in 2014 which is the only arrest that my clients are  
11 involved in.

12 And on that date, the documents, the  
13 exhibits attached to the motion would reveal that not  
14 only did we rely upon the sex offender register  
15 information, information conveyed by Lt. Parker, but we  
16 also asked the Plaintiff himself whether or not he was,  
17 in fact, residing at the address that he reported that  
18 he was residing at in the sex offender registry  
19 document. And he responded in the negative lending even  
20 further credence or basis for probable cause for his  
21 arrest.

22 I would also indicate the pleading  
23 deficiencies contain no allegations against Defendants  
24 Rathbun or Holtz to suggest that Plaintiff was not a  
25 proper subject of the sex offender registry in 2014 at

1 the time of his arrest. Nor is there any suggestion or  
2 factual basis to support a suggestion that my clients  
3 acted with malice or ill-will to overcome qualified  
4 immunity.

5 As Counsel indicated, the individual  
6 Defendants are entitled to make reasonable mistakes in  
7 reliance upon transmittal or direction from others and  
8 there is no clear established constitutional right  
9 requiring that officers Rathbun and Holtz back in 2014  
10 go beyond the performance of the statutorily-required  
11 duties on the part of Michigan State Police to maintain  
12 that sex offender registry and to maintain the  
13 information accurately or the direction of the Hillsdale  
14 County Sheriff's Department in this case provided to  
15 officer Rathbun that the Plaintiff should be arrested  
16 in 2014.

17 The prosecutor who reviewed it, the  
18 Plaintiff's own criminal defense attorney and two  
19 separate and distinct justices or magistrates who  
20 independently evaluated the existence of probable cause  
21 for the 2014 arrest and the underlying charge faced by  
22 the Plaintiff to determine if there was some type of  
23 relevant change in the law applicable to the Plaintiff.

24 I would also point out that Plaintiff seems  
25 to agree that that data information on the sex offender

1 registration form provided by the Michigan State Police  
2 should have somehow provided officer Rathbun with enough  
3 data to have potentially gleaned through the performance  
4 of some significant mathematical computation that the  
5 Plaintiff was no longer, in fact, obligated to register  
6 under the Act based upon the 2011 amendment to the Act.

7 I would point out to the Court that even if  
8 somehow officer Rathbun could have divined that the  
9 Plaintiff was no longer entitled to register, even  
10 though the critical component, the date of conviction,  
11 was not on that document which would be absolutely  
12 necessary to do this mathematical computation.

13 All that does is raise an issue of  
14 negligence or unreasonable conduct on the part of  
15 officer Rathbun and certainly doesn't suggest any  
16 intentional or act of deliberate indifference to the  
17 rights of the Plaintiff.

18 Finally I would point out under Monell, if  
19 there are no constitutional deprivations committed by  
20 the individual officer, there is no city of Hillsdale in  
21 this case, but also that the only incident cited by the  
22 Plaintiff is in fact a 2014 arrest of him by officer  
23 Rathbun.

24 And the case law clearly requires that if  
25 you're going to rely upon a policy or custom to

1 establish a Monell liability against a defendant, it has  
2 to be the product of a clear and persistent pattern.  
3 And there is not even a hint of a pattern in this case.  
4 The only arguable evidence they have is this one  
5 isolated circumstance which is insufficient to create a  
6 liability under Section 1983.

7 And with that, Your Honor, I will also defer  
8 to the comprehensive pleadings that I filed in this  
9 matter unless the Court has any questions.

10 THE COURT: No, I don't. Thank you very  
11 much.

12 MR. ROBINSON: Your Honor, I don't have a  
13 motion pending today, but just for background for the  
14 Court, I came into the case late, I had been retained by  
15 the Watch System, Ms. Hurwitz asked and you gave me a  
16 time to file an answer to an amended complaint that was  
17 due. However, I think the Court's ruling on some of the  
18 rulings will impact the claims against my client. And  
19 once I have the second amended complaint filed, I can  
20 then file my motion in response to that. But I have not  
21 been served with the second amended complaint.

22 THE COURT: All right, thank you.

23 You may respond.

24 MS. HURWITZ: Thank you and good afternoon,  
25 Your Honor.

1                   Your Honor, first I would like to reiterate  
2 that we are here on a motion to dismiss although both  
3 Defendants, City and County, presented their motions as  
4 hybrid motions, motions to dismiss or alternatively for  
5 summary judgment. This should be considered as a motion  
6 to dismiss.

7                   We have not had a chance to submit any  
8 information to make our case so that you can consider  
9 this as a motion for summary judgment.

10                  And also significantly, there has been no  
11 discovery yet.

12                  And the Sixth Circuit has repeatedly said  
13 that in certain cases where there has not been, where  
14 there has not been discovery, it is premature to grant  
15 or to consider a motion for summary judgment and has  
16 reversed a lower court's cases on that basis.

17                  So in considering a motion as a motion to  
18 dismiss, the question is are there sufficient facts to  
19 make out a plausible claim for relief. Not a definite  
20 claim, not a possible claim, a plausible claim for  
21 relief which is what Plaintiff has alleged.

22                  Plaintiff has alleged that these Defendants,  
23 both City, County and their officers, knew that Anthony  
24 Hart was no longer subject to the requirements of the  
25 Sex Offender Registry Act and yet they proceeded to

1 arrest him to instigate his prosecution.

2 How did they know? What we have said is  
3 these Defendants knew Anthony Hart. They are  
4 registered, both the City and County are considered  
5 under the SORA as registered authorities. That means  
6 they are responsible for taking in the information of  
7 every sex offender that is required to register in their  
8 city, in their county.

9 And that if one looks at the SORA and its  
10 requirements, which is cited in our brief, they have the  
11 responsibility to have his entire criminal history, the  
12 dates, the specific facts of the crime for which he was  
13 convicted and for which he has to be registered. They  
14 have all of that.

15 And on top of that, we have learned they  
16 have his entire criminal, his entire criminal history  
17 because they know him. He is a life-long resident of  
18 that County and they have come into contact plenty of  
19 times with him. They personally knew him.

20 And on top of that, then the law was changed  
21 in 2011. The officers in the state are charged with  
22 enforcing the law.

23 They can't say they did not know the law was  
24 changed and they can't say they did not know Anthony  
25 Hart and know all of his information including his date

1 of birth.

2 One of these officers in fact came into  
3 contact with him on a separate issue only a year before  
4 and knew he was only 15 years old, the year before this  
5 particular crime.

6 And therefore, it is kind of beyond belief  
7 for them to allege they did not know who he was.

8 If we look even further, Defendant Lt.  
9 Parker, Lt. Parker has had, has been with the sheriff's  
10 department since Anthony was only a year old.

11 Anthony, unfortunately, if you look at his  
12 criminal history, you will see how much he has been  
13 harassed by these departments and by these officers.

14 He was, on every little childhood prank, he  
15 was imprisoned. And that is also a basis of their  
16 knowledge.

17 In fact, these officers continued to harass  
18 him, and if it continues, this might be the subject for,  
19 you know, a restraining order against them.

20 But what we're alleging is that they knew  
21 him, they knew his history, and therefore, any kind of  
22 information that they put forth that he was still  
23 subject to the registry and the requirements of the SORA  
24 was false and he knew they were false.

25 What they're trying to do is say we had

1 reliable information that we received from the Michigan  
2 State Police, and therefore, we are not liable. We are  
3 not responsible. And then the city Defendants say,  
4 well, we relied on Parker, and therefore, we are not  
5 responsible or entitled to rely on what Parker told us  
6 as fellow law enforcement officials.

7 The problem with that is the law says, no,  
8 you can't do that. You cannot ignore information that  
9 tells you otherwise.

10 And we have cited plenty of cases, and I  
11 take issue with him saying that we have not cited cases  
12 to say they're not entitled to rely on this information  
13 because we cited a number of cases in our brief that  
14 when an officer has information to indicate other than  
15 what the information that is conveyed from a fellow  
16 officer, then they are responsible for considering all  
17 of the circumstances before making a probable cause  
18 determination.

19 And what these officers did is bury their  
20 heads in the sand and say, well, we're entitled to rely  
21 on this information when they had information to let  
22 them know otherwise.

23 Just to address a couple more points that  
24 were raised. Both City and County here argued facts  
25 that should not be considered because we have not had a

1 chance to conduct discovery yet; and therefore, they  
2 were going beyond what was in the pleadings, for  
3 example, saying that Plaintiff Anthony Hart admitted  
4 that he was required to register and he did not  
5 register.

6 Not only is that not in the Complaint, we  
7 don't concede that at all. That is not an issue here  
8 and that should not be considered here.

9 We believe that we can prove, we can prove  
10 that they knew Anthony Hart was not subject to these  
11 requirements and they proceeded to arrest and prosecute  
12 him.

13 We ask and we are entitled to be able to  
14 conduct discovery so that we can prove and present to a  
15 jury facts by which they can determine that these  
16 officers are liable because they knew and they lied.

17 In terms of what was raised, and I know it  
18 was included and attached as a document to the City's --  
19 I think it was a City's motion, a copy of the  
20 Plaintiff's certified criminal history. And Plaintiff  
21 alleged the fact also and it was another indication  
22 that, you know, if they ignored everything else, this  
23 was something that told them this is wrong.

24 It is not that they needed to do any kind of  
25 mathematical computation, that is not true. What we're

1 saying is critical information was on there to alert any  
2 reasonable officer that something is wrong here.

3 The issue that stands out, that jumps out at  
4 you is the registry's end date that was listed as 2054.  
5 That doesn't even make sense. That doesn't even make  
6 sense as the end date. You have Tier I is required to  
7 register for 15 years, Tier II for 25 years. Where does  
8 2054 come from? It jumps out at you and any reasonable  
9 officer would say, something is wrong here. Even if  
10 they wanted to and knowing everything else.

11 So it is not a reasonable mistake, it is not  
12 anyone was negligent here. It goes beyond that, and we  
13 will be able to prove that, Your Honor.

14 I think the lastly the Monell issue, under  
15 Monell, it's specifically the City that says that we can  
16 not have, or really both of them say we do not have a  
17 claim because we have not proven or we have not even  
18 alleged a custom or policy.

19 Well, the Supreme Court has said that a  
20 failure to train is a custom or policy and we have  
21 alleged a failure to train.

22 To survive a motion for dismissal on failure  
23 to train or failure to supervise, a plaintiff must show  
24 a training or supervision was inadequate for the task  
25 to be performed, that the inadequacy was the result of

1 deliberate indifference, and the inadequacy was closely  
2 related to or actually caused the injury.

3 Now, what the Defendants are saying is that  
4 we cannot prove a persistent pattern. But that is not,  
5 that is only one of two options that are indications of  
6 liability here.

7 So a plaintiff can prove that the second  
8 element of deliberate indifference in one of two ways.  
9 One of them is by showing a failure to provide adequate  
10 training in light of foreseeable consequences that could  
11 result from a lack of adequate instruction or by showing  
12 that they failed to act in response to repeated  
13 complaints, and the Plaintiffs are alleging the second  
14 one and that the municipality, the City and County  
15 ignored.

16 We're saying that it's the failure to  
17 provide adequate training in light of foreseeable  
18 consequences. They knew their officers were tasked with  
19 information in the SOR. They knew their officers were  
20 going to come into contact with convicted sex offenders  
21 or offenders that are required to register. They knew  
22 that the acts of their officers who were going to have  
23 consequences on these members of the public.

24 And despite that knowledge, they did nothing  
25 to properly train their officers to know when a

1 registered sex offender is no longer required to  
2 register and in their failure to also supervise them  
3 when they inadequately perform their tasks.

4 So we do have a viable failure to train  
5 policy claim under Monell.

6 And even if, even if -- now, we did allege  
7 sufficient facts to survive this motion and will be able  
8 to prove liability of these Defendants, but even if this  
9 Court decides otherwise and grants qualified immunity,  
10 there will still be a case against the City and the  
11 municipality. And that case is cited in our brief --  
12 I'm sorry, I'm not seeing it on my notes, but it is  
13 cited in our brief that a city or municipality cannot  
14 rely on the good faith of their officers to escape  
15 liability under Monell. And I would end there unless  
16 Your Honor has any questions.

17 THE COURT: I don't have any questions at  
18 this time, but thank you for your argument.

19 Does anybody have any reply that argues  
20 something they haven't already argued?

21 No? Then I'll take your motions under  
22 advisement and I will give you a written order.

23 (Proceedings concluded at 3:46 p.m.)

24 \* \* \* \* \*

25

1 C E R T I F I C A T I O N  
2 I, CHERYL E. DANIEL, Official Federal Court  
3 Reporter, after being first duly sworn, say that I  
4 stenographically reported the foregoing proceedings held  
5 on the day, date, time and place indicated. That I  
6 caused those stenotype notes to be translated through  
7 Computer Assisted Transcription and that these pages  
8 constitute a true, full and complete transcription of  
9 those stenotype notes to the best of my knowledge and  
10 belief.

11 I further certify that I am not of counsel  
12 nor have any interest in the foregoing proceedings.

13

14

15

16 /C/ CHERYL E. DANIEL,

17

18

19 CHERYL E. DANIEL,

20 FEDERAL OFFICIAL COURT REPORTER

21

22 DATED: May 4, 2018

23

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25